



Advisory Opinion 08-008

This is an opinion of the Commissioner of Administration issued pursuant to Minnesota Statutes, section 13.072 (2007). It is based on the facts and information available to the Commissioner as described below. All public data the Commissioner relied upon to issue this opinion are available for public inspection and copying at the office of the Information Policy Analysis Division (IPAD), unless the data have been disposed of in compliance with the state Records Management Act.

Facts and Procedural History:

On January 4, 2008, IPAD received a letter, dated same, from Joseph Flynn and Jennifer Earley, attorneys, on behalf of their client, Independent School District 719, Prior Lake-Savage. In their letter, Mr. Flynn and Ms. Earley asked the Commissioner to issue an advisory opinion regarding the classification of certain data the District maintains. IPAD requested clarification, which they provided, after discussion and revision, on March 13, 2008.

Because the outcome of this opinion may affect the rights of the data subject, Mr. Chris Lind, the Commissioner offered him, through his attorney, an opportunity to submit comments. Upon their request, the Commissioner invited Mr. John Borger, on behalf of the *Star Tribune*, and Mr. Mark Anfinson, on behalf of the *Prior Lake American*, to submit comments. Mr. Borger did so in a letter dated March 31, 2008; Mr. Anfinson submitted comments during the time that IPAD was clarifying the issue with the District.

A summary of the facts follows. Mr. Lind is a former employee of the District. According to Ms. Earley:

The School District [terminated] Mr. Lind and Mr. Lind did not appeal or otherwise challenge this decision, resulting in a final disposition of disciplinary action. See Minn. Stat. §13.43, subd. 2(a)(5). Therefore, it is the School District's position that Mr. Lind's termination, as well as the specific reasons for his termination and data documenting the basis of the action, would be public pursuant to Minnesota Statutes Section 13.43, subdivision 2(a)(5).

After his employment was terminated, Mr. Lind was elected to the ISD 719 School Board, and is a current Board member. Subsequent to his termination, he submitted to the District the data at issue here, consisting of two documents ("One" and "Two"), which relate to his status both as a former employee and as a School Board member. Ms. Earley stated, "[a]t the present time, the School District has classified the enclosed data as not public."

(The Commissioner notes that she determined that Mr. Lind likely could be identified by a description of the unique circumstances of his employment, termination, and election to the

Board, which are public, and therefore will not use a pseudonym. Thus, the data at issue will be described generally; the opinion will not disclose private data.)

Ms. Earley wrote:

It is the School District's understanding that as a School Board member, data of which Mr. Lind is the subject, may be classified as personnel data pursuant to Minnesota Statutes Section 13.43, depending upon School District policy or practices. See [Advisory Opinion] 04-064. To the extent this is relevant to the Commissioner's analysis, the Commissioner should be aware that the School District presently does not have a policy or practice with respect to the classification of data regarding its School Board members. Thus, should the data be determined to relate to Mr. Lind's status as a School Board member, the School District has not taken any affirmative action to classify such data as private.

To the extent the data relates to Mr. Lind's status as a former employee, it would appear that the data in question would constitute personnel data if the data is '*collected*' because the individual is or was an employee' of the School District. . . . The School District did not take any affirmative action to collect the data. [Emphasis provided.]

Issue:

Based on Mr. Flynn and Ms. Earley's request, the Commissioner will address the following issue:

Pursuant to Minnesota Statutes, Chapter 13, what is the classification of certain data Independent School District 719, Prior Lake-Savage, received from an individual who is a former employee and current School Board member?

Discussion:

Pursuant to Minnesota Statutes, section 13.03, government data are public unless otherwise classified.

Section 13.43 classifies data on individuals who are current or former employees of a government entity. Subdivision 2 lists the types of personnel data that are public and subdivision 4 classifies most other types of personnel data as private.

When a government entity has taken disciplinary action against an employee and a final disposition has occurred, the following data are public under subdivision 2(a)(5): the final disposition of any disciplinary action together with the specific reasons for the action and data documenting the basis for the action.

According to Mr. Flynn and Ms. Earley, the District took final disciplinary action against Mr. Lind, when it terminated his employment. There is no dispute that the data in question were created subsequent to Mr. Lind's firing. Consequently, those data cannot be data that document

the basis of final disciplinary action. The District could not have based its decision about disciplinary action on data that did not exist at the time it made its decision.

Upon examination of the data in the first document, it is the Commissioner's determination that the data are about Mr. Lind as a former employee and as such, are classified by section 13.43. The data are not among those listed as public in section 13.43, subdivision 2. Accordingly, the data in document One are private pursuant to section 13.43, subdivision 4.

Document Two contains data that are about Mr. Lind as a former employee, and data about him as a School Board member. Ms. Earley stated that the District has no policy regarding data about School Board members, which the Commissioner interprets to mean that the District does not consider them to be employees. (See 04-064.) Thus, section 13.43 does not apply, and the data are presumptively public.

The Commissioner has opined previously that a government entity is in the best position to determine the subject(s) of the data it maintains. However, Ms. Earley asked for specific guidance, which the Commissioner has determined is possible in this case. Document Two, which consists of two short paragraphs, contains the following statements: "... a parent group has started a petition drive with the intent to force Mr. Lind from the Board. The petition can be found at <http://www.ipetitions.com/petition/719cares/>." The Commissioner believes those statements relate solely to Mr. Lind's status as a School Board member, and as such are public data.

Ms. Earley and Mr. Borger raised a question which the Commissioner feels obliged to address, although it does not affect the outcome of this opinion. The issue is whether data that are not "collected" by an entity can be personnel data. Pursuant to section 13.43, personnel data are defined as "data on individuals collected because the individual is or was an employee . . ."

Ms. Earley wrote that in 2005, the Minnesota Court of Appeals issued an unpublished opinion in the matter of *Stephens v. Board of Regents of the University of Minnesota*, Co. No. A04-418, 2005 WL 287488 (Minn. Ct. App. 2005) (unpublished). Ms. Earley quoted from *Stephens*:

...Personnel data is defined as data 'collected' on an individual based on the person's status as an employee. . . . A public agency collects data by taking some 'affirmative action . . . to gather or assemble the data,' *Westrom v. Minn. Dept. of Labor Indus.*, 686 N.W. 2d 27, 34 (Minn. 2004), not when it is a mere 'passive recipient' of the information. *St. Peter Herald v. City of St. Peter*, 496 N.W.2d 812 (Minn. 1993). Because the university was a passive recipient of the letter, the district court properly ruled that the university did not 'collect' this data.

Ms. Earley, noting that the *Stephens* opinion is unpublished and, therefore, not precedential, asked whether the decision impacts the issue before the Commissioner.

In his comments to the Commissioner, Mr. Borger stated: "[a]lthough *Stephens* was an unpublished decision and therefore not binding as precedent, its reasoning rested on *Westrom*

and *St. Peter Herald*, two decisions of the Minnesota Supreme Court that are precedential and that any Advisory Opinion in this matter must follow.”

The Commissioner respectfully disagrees with Mr. Borger. “Government data” are classified at section 13.02, subdivision 7, as all data “collected, created, received, maintained or disseminated by any government entity.” Although personnel data are defined under section 13.43 as data on an individual that are “collected” by a government entity, that section also describes and classifies many data that are, for example, created (specific reasons for final disciplinary action), or received (complaints or charges against an employee). In addition, government entities create, receive and maintain lots of data about employees, including performance evaluations, specific medical reasons for leave, etc., that have always been treated as private personnel data under section 13.43, subdivision 4. The Commissioner therefore does not find *Stephens* persuasive; to do so would render meaningless most of section 13.43.

In further support of this position, section 645.17, states, “(1) the legislature does not intend a result that is absurd, impossible of execution, or unreasonable; [and] (2) the legislature intends the entire statute to be effective and certain.”

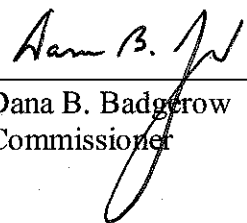
The Legislature may want to clarify the issue by amending the definition of personnel data to include the same language it used to define government data generally, i.e., data collected, created, received, maintained or disseminated by a government entity.

Opinion:

Based on the facts and information provided, my opinion on the issue that Mr. Flynn and Ms. Earley raised is as follows:

Pursuant to Minnesota Statutes, Chapter 13, the classification of the data Independent School District 719, Prior Lake-Savage, received from an individual who is a former employee and current School Board member, is as follows: the data in document One are private personnel data, pursuant to section 13.43; the data in document Two are a mixture of private personnel data and public data, as discussed above.

Signed:


Dana B. Badgerow
Commissioner

Dated:

May 1, 2008